SENATE RECORD VOTE ANALYSIS

104th Congress — December 20, 1995, 7:38 p.m.
1st Session — **Vote No. 610** — Page S-18939 Temp. Record

WHITEWATER SUBPOENA/Final Passage

SUBJECT: **Whitewater Subpoena Resolution . . . S. Res. 199. Final passage, as amended.**

ACTION: RESOLUTION AGREED TO, 51-45

SYNOPSIS: As passed, S. Res. 199, the Whitewater Subpoena Resolution, resolves "That the Senate Legal Counsel shall bring a civil action in the name of the Special Committee to Investigate Whitewater Development Corporation and Related Matters to enforce the Special Committee's subpoenas and orders to William H. Kennedy, III, and the Senate Legal Counsel shall conduct all related civil contempt proceedings." The subpoena seeks handwritten notes taken by Mr. Kennedy during a 1993 meeting on Whitewater-related matters. At the time, Mr. Kennedy was a Federal employee, serving as an Associate Counsel to the President. Three other Federal Government employees were at the meeting, two of whom were also from the White House counsel's office, and one of whom (Mr. Lindsey) was the Director of White House personnel, which is a policy, rather than a legal, post. Additionally, three private lawyers for the President and Mrs. Clinton were at the meeting. The Special Committee issued the subpoena for the notes because they may contain important evidence with respect to at least six areas which the Special Committee is investigating, as follows:

- whether the White House improperly handled confidential Resolution Trust Corporation (RTC) information about Madison Guaranty Savings & Loan Association and Whitewater Development Corporation;
- whether the Department of Justice improperly handled RTC criminal referrals relating to Madison Guaranty and Whitewater;
- the operations of Madison Guaranty;
- the activities, investments, and tax liability of Whitewater, its officers, its directors, and its shareholders;
- the handling by RTC and other Federal regulators of civil or administrative actions against any parties regarding Madison; and
- the sources of funding and lending practices of Capital Management Services, and its supervision by the Small Business Administration, including any alleged diversion of funds to Whitewater.

The resolution's preamble notes the following:

- the Special Committee has authority to issue subpoenas for the production of documents;

(See other side)

YEAS (51)

Republicans (51 or 100%)		Democrats (0 or 0%)
Abraham	Helms	
Ashcroft	Hutchison	
Bennett	Inhofe	
Bond	Jeffords	
Brown	Kassebaum	
Burns	Kempthorne	
Campbell	Kyl	
Chafee	Lott	
Coats	Lugar	
Cochran	Mack	
Cohen	McCain	
Coverdell	McConnell	
Craig	Murkowski	
D'Amato	Nickles	
DeWine	Pressler	
Dole	Santorum	
Domenici	Shelby	
Faircloth	Simpson	
Frist	Smith	
Gorton	Snowe	
Grams	Specter	
Grassley	Stevens	
Gregg	Thomas	
Hatch	Thompson	
Hatfield	Thurmond	
	Warner	

NAYS (45)

Republicans (0 or 0%)	Democrats (45 or 100%)	
	Akaka	Hollings
	Baucus	Johnston
	Biden	Kennedy
	Bingaman	Kerrey
	Boxer	Kerry
	Bradley	Kohl
	Breaux	Lautenberg
	Bryan	Leahy
	Bumpers	Levin
	Byrd	Lieberman
	Conrad	Mikulski
	Daschle	Moseley-Braun
	Dodd	Moynihan
	Dorgan	Murray
	Exon	Nunn
	Feingold	Pell
	Feinstein	Pryor
	Ford	Reid
	Glenn	Robb
	Graham	Rockefeller
	Harkin	Sarbanes
	Heflin	Simon
		Wellstone

NOT VOTING (3)

Republicans (2)	Democrats (1)
Gramm-[2]	Inouye-[2]
Roth-[2]	

EXPLANATION OF ABSENCE:
1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

Compiled and written by the staff of the Republican Policy Committee—Don Nickles, Chairman

- on December 8, the Special Committee authorized the issuance of a subpoena duces tecum to William H. Kennedy, III, directing him to produce certain documents by December 12;
- on December 12, the Special Counsel to the President and the personal counsel for the President and Mrs. Clinton submitted legal objections to the subpoena;
- on December 12, counsel for Mr. Kennedy, on the instructions of the White House Counsel's Office and the personal counsel for the President and Mrs. Clinton, informed the Special Committee he would not comply with the subpoena;
- on December 14, the Special Committee considered and completely rejected the legal objections that were raised to the subpoena, and ordered Mr. Kennedy to comply by December 14;
- Mr. Kennedy refused to comply;
- on December 15, the Special Committee issued a second subpoena, ordering Mr. Kennedy to produce the documents by December 18;
- on December 18, Mr. Kennedy notified the Special Committee that the White House Counsel's Office and the President's personal lawyers had instructed him not to comply;
- on December 18, the Chairman of the Special Committee overruled the legal objections to the second subpoena;
- Mr. Kennedy has continued to refuse to comply with the subpoenas;
- the Special Committee is authorized to recommend that the Senate take civil enforcement actions; and
- the Senate Legal Counsel is required under law to bring a civil action to enforce a Senate committee's subpoena when directed to do so by a resolution of the Senate.

Those favoring final passage contended:

The Senate has the unpleasant duty of enforcing a subpoena to a White House official who has, on the orders of President Clinton, refused to release notes he took at a meeting on Whitewater-related matters. We do not relish this confrontation, and will instantly withdraw this resolution if the notes are released to the Senate. For 4 months, as detailed on the previous vote (see vote No. 609), the Senate has attempted to negotiate a resolution of this impasse, but the White House has been intransigent. The bottom-line is that the Senate has constitutional investigatory responsibilities, in meeting those responsibilities on the Whitewater investigation it has a right and a duty to obtain the notes of this meeting, the White House's legal arguments for not turning over the notes are baseless, and the Senate must therefore demand and require the release of those notes, by court order if necessary.

The importance of obtaining Mr. Kennedy's notes of this meeting can be seen when the meeting is viewed in context. In February 1989, Madison Guaranty Savings & Loan failed, costing the American taxpayers $60 million. Madison Guaranty was run by James McDougal, who was the business partner with then-Governor Clinton and Mrs. Clinton in a development project called Whitewater, which also failed. The House hearings on Whitewater revealed that at least $80,000 in insured deposits were taken from Madison Guaranty and put into this project. Capital Management Services (CMS), a federally backed small business investment corporation that existed to make loans to the disadvantaged, indirectly made a $300,000 loan to Whitewater. David Hale, who ran CMS, alleges that then-Governor Clinton pressured him into making that loan. Hilary Clinton represented Madison Guaranty through the Rose law firm. The Senate's 1994 hearings on Whitewater revealed that confidential information on criminal referrals from an ongoing Federal investigation of the Madison failure was given to White House officials. That transfer of information was highly improper and possibly illegal. Shortly after that transfer of information to White House officials, four Federal employees (three of whom were White House lawyers and one of whom was the White House personnel director) met with three current and former lawyers of the Clintons. Those private lawyers worked for the Clintons on Whitewater, Madison, and related issues. The White House contends that this was a meeting in which the President's former private attorney, Mr. Kennedy, gave information to his newly retained counsel, Mr. Kendall. The White House's lawyers claim that they were at the meeting to "impart information that had been provided to them in the course of official duties." We know that White House lawyers were improperly or illegally informed of nonpublic aspects of ongoing investigations involving the President and First Lady; Mr. Kennedy's notes might reveal whether or not these Government lawyers on November 7 gave this information to the President and First Lady's private lawyers.

Parties to this meeting have refused to divulge details of the matters discussed, other than to assert that confidential information related to the referrals was not slipped by White House officials to the three private attorneys who were present. They have insisted, at the direction of the Clinton Administration, that the details of this meeting are protected by attorney-client privilege. They are wrong. Attorney-client privilege is a common law, court-created right, with limits, for an individual to have confidential legal communications with his or her lawyer. Courts do not view the attorney-client privilege as a fundamental judicial procedural requirement that is vital for fairness. Judges developed this doctrine based on policy considerations designed to foster a fair and effective adversary legal system. It theoretically promotes the interest of an individual facing an adversary civil or criminal action. It applies only to communications between a client's lawyer(s) and a client. If others are present, the communications are not privileged. It only applies to legal communications concerning representation of the client, and only to the extent that they are proper communications; the privilege does not apply, for example, to communications that may facilitate the commission of improper acts. The most prominent expert on the law of privileges and evidence, Dean Wigmore, explained the reasoning behind so strictly limiting

the application of this privilege as follows: "its benefits are all indirect and speculative, its obstruction is plain and concrete * * *. It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." Courts have universally required the party asserting the existence of the attorney-client privilege to bear the burden of establishing its existence. Blanket assertions of its existence are rejected. The party must demonstrate conclusively with specific facts that prove that each element of the privile ge is present and has not been waived before it is granted.

The existence of the privilege in the Senate is even more tenuous. Congressional investigations are not bound by the procedural rules of criminal or civil courts; Congress is a constitutionally separate branch of government with its own responsibilities and with the constitutional duty to set its own rules to best meet those responsibilities. Congress' investigations are not adversarial in the sense of a criminal or civil procedure; they are to obtain information that is needed for legislative purposes. The private interest in not revealing information is less, and the public need for that information is greater. With this understanding, the Senate has granted the attorney-client privilege only on a discretionary basis. The longstanding rule, and practice, in the Senate has been to balance the legislative need against any possible injury. On numerous occasions, Senate committees have rejected invocations of privilege that met the court-created standards.

We turn now to the President's assertion that Mr. Kennedy's notes are protected by the attorney-client privilege. First, it is questionable that the privilege can be asserted to apply to a conversation at which the client is not present. Neither the President nor the First Lady attended the meeting. Second, of the seven individuals who were present at the meeting, one was not an attorney for the President or First Lady in either a public or private capacity. He had a law degree, but his position was White House Personnel Director. The presence at a meeting of an individual who is neither the client nor an attorney representing the client automatically waives the confidentiality of the meeting. Third, of the individuals representing the President, three were Federal Government employees, who could have been present to represent the Office of the President, and three were current or former employees of the President's who represented him and the First Lady in a private capacity. At this point, it should be noted that this meeting involved four clients: Bill Clinton as President; Bill Clinton as a private individual; Hillary Clinton as First Lady; and Hillary Clinton as a private individual. The White House has claimed that the fact that the lawyers at the meeting were representing different clients--the President and First Lady as public officials, and the Clintons as private individuals--does not constitute a waiver of the attorney-client privilege because the privilege still applies when separate clients face a common adversary. In this case, though, the clients do not face a common adversary. The Government is pursuing the Whitewater investigation in which the Clintons are involved. The Clintons are represented by their private lawyers in that investigation. Government lawyers who work for the President do not work for the President as a private individual--they work for him in his official capacity. Government lawyers represent the Government, not private individuals. When the Government investigates individuals, the relationship is potentially an adversarial one. A meeting between White House lawyers who represent the President in his official capacity and lawyers who represent him in his private capacity when he is a potential witness or more in an ongoing Government investigation do not have a common adversary--they are potential adversaries. This meeting emphatically did not involve lawyers sharing information for multiple clients against a common adversary, and thus the attorney-client privilege would not apply in any court in the country.

Another claim that has been made by the President is that releasing this information to the Senate would be taken as a waiver of the privilege in court. Assuming for a moment that there is any validity to the claim that the privilege applies, we note that the only precedents on congressional testimony are to the contrary. Specifically, the U.S. Court of Appeals for the District of Columbia ruled in its 1979 decision *Murphy* v. *Department of the Army* that disclosure of allegedly privileged material to a congressional committee would not waive the privilege in any future litigation. Several cases since then have followed that precedent.

As we said at the outset, we would be happy to drop our insistence on this subpoena at any time if we are given Mr. Kennedy's notes. We do not relish a lengthy court battle, but if necessary, we will take Mr. Kennedy to court, and we will win. Our colleagues, and the President, must understand the weakness of their argument. The attorney-client privilege does not apply. If the last vote is any indication, this vote will be along party lines. Still, unless there is some huge, damaging revelation in those notes, we expect the White House to relent before going to court. Surely it does not need to engage in a fight that it cannot win.

Those opposing passage contended:

This confrontational approach is not helpful. We would have preferred to have the negotiations continue. We are confident that President Clinton is determined to go the extra mile to be cooperative, but we do not expect him or anyone else to have to disclose records of their confidential communications with their attorneys. Our Republican colleagues may not think so, but even a Democratic President has rights in this country. Frankly, we are getting rather upset with the pace and scope of the Whitewater investigation. The costs are mounting, and nothing much seems to be coming from it. If this resolution passes, the Senate will end up in a lengthy court battle with the President, and the results of that battle will have constitutional implications. Some Senators have explained why they think the attorney-client privilege does not apply in this case--we respond simply by noting that we know of some legal scholars who disagree. If we end up in court, the decision may favor the opinion of these scholars instead of the opinion of our colleagues, and Congress' ability to conduct future investigations will be thus retarded. It was a mistake to issue these subpoenas. It is not too late

to correct that mistake--all Senators must do is join us in voting against this resolution.